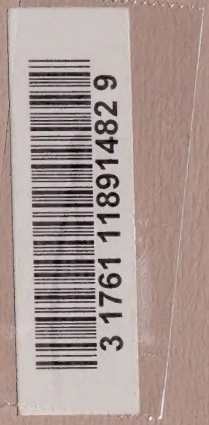

Ontario Energy Board

In the matter of
a hearing respecting
the sale of gas in
Ontario by brokers.

Northridge Petroleum Marketing Inc.
ATCOR LTD.
Brenda Marketing Inc.
Enron Canada Ltd.

E.B.C. 177
E.B.C. 178
E.B.C. 179
E.B.C. 180

DECISION WITH REASONS

E.B.C. 177
E.B.C. 178
E.B.C. 179
E.B.C. 180

IN THE MATTER of the Municipal Franchises Act, R.S.O. 1980, Chapter 309;

AND IN THE MATTER OF the Ontario Energy Board Act, R.S.O. 1980, Chapter 332;

AND IN THE MATTER OF applications by Northridge Petroleum Marketing, Inc., ATCOR LTD., Brenda Marketing Inc. and Consoligas Management Ltd. pursuant to Section 8 of the Municipal Franchises Act, for a Certificate of Public Convenience and Necessity approving the supply of gas by the Applicants in all Ontario Municipalities and, pursuant to Section 16 of the Ontario Energy Board Act, for there to be included as a term of the said Certificates a declaration that the Applicants are not required to obtain franchises for the supply of gas in the said Municipalities.

BEFORE: R.W. Macaulay, Q.C.
Chairman and Presiding Member

J.C. Butler
Vice-Chairman

D.A. Dean
Member

M. Jackson
Member

C.A. Wolf Jr.
Member

DECISION WITH REASONS

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1. INTRODUCTION

The Applications and Hearing

1.1 This Decision concerns the applications by Northridge Petroleum Marketing, Inc. (Northridge) dated September 11, 1986, ATCOR LTD. (ATCOR) dated September 26, 1986, Brenda Marketing Inc. (Brenda) dated November 7, 1986, and Enron Canada Ltd., formerly Consoligas Management Ltd., (Enron) dated December 3, 1986, (the Applicants) for Certificates of Public Convenience and Necessity (the Applications).

1.2 The Applications were assigned Board File Nos. E.B.C. 177, 178, 179 and 180 respectively. The Applications to the Ontario Energy Board (the Board or the OEB) were filed pursuant to the Municipal Franchises Act.

1.3 In accordance with Procedural Orders of the Board the hearing of the Applications was concurrent with, and incorporated the record

of, Board proceedings under File Nos. E.B.R.O. 410-II, 411-II and 412-II for The Consumers' Gas Company Ltd. (Consumers'), ICG Utilities (Ontario) Ltd (ICG) and Union Gas Limited (Union) respectively (the Main Hearing).

1.4 The Applicants requested certificates that would allow them to supply gas in all municipalities in Ontario. The Applicants also sought as a term of the certificate a declaration that they not be required to obtain franchises to supply gas to these municipalities.

1.5 Notices of Application and Hearing, two dated September 29, 1986 (Northridge and ATCOR), one dated December 2, 1986 (Brenda), and one dated December 4, 1986 (Enron) were issued by the Board. These hearings were combined and held on December 16, 1986, immediately following the Main Hearing.

1.6 During the combined certificate hearing, two witnesses appeared, one representing Brenda and the other representing Enron. Northridge and ATCOR witnesses appeared during the broker portion of the Main Hearing. Final argument was received at the Board by January 26, 1987.

The Interim Decision

1.7 An Interim Decision with Reasons in this proceeding (under File Nos. E.B.C. 177, 178,

179 and 180) was issued on April 8, 1987 (the Interim Decision) and the Board deferred final decisions on the Applications.

1.8 The Board stated that "... the introduction of brokers as marketers in Ontario was an appropriate step", but that it "has reviewed the submissions [of participants from the hearing] ... and has concluded that the subject was not adequately addressed to enable the Board to make a determination ... "

1.9 The Board noted that until the March 23, 1987, Contract Carriage Decision under File Nos. E.B.R.O. 410-II, 411-II and 412-II (the March 23 Decision or T-Rates Decision) was issued "... participants were uncertain if brokers would be permitted to operate in Ontario at all." That uncertainty was eliminated by the March 23 Decision and the Board found it important that all participants and other affected parties be given the opportunity to present submissions to assist the Board in making its final decision on the Applications.

1.10 The Board made it clear, however, that it lacked the jurisdiction to condition the certificates to dispense with the obligation to obtain municipal franchises.

1.11 The Board, by Procedural Order 7 dated June 8, 1987, invited all interested persons, including utilities, municipalities, individuals, industries, associations, governments, companies, and any others who may be interested, to make written submissions on the role of brokers as potential suppliers to Ontario customers and on the criteria and prerequisites to be applied in determining if a broker should be approved to operate as a principal in the sale of gas in Ontario. The submissions were to be filed with the Board by August 15, 1987.

1.12 In order to focus the written submissions of the participants on the matters that, in the Board's view, were inadequately addressed in the hearing, the Board requested that the submissions include, but not necessarily be restricted to, a discussion of the following issues:

a) the role of brokers in Ontario;

b) the financial assurances or tests, if required, that the Board should impose upon an applicant which wishes to operate as a broker in Ontario;

c) the contribution, if any, by brokers to promotional activities for natural gas;

d) the security of supply requirements, if any, for various end-use markets;

e) the information reporting requirements, if any;

f) the obligation to serve; whether this should be a requirement on all brokers and, if so, whether it should be the same for all end-use markets;

g) the obligation to provide maintenance and other services to end-use customers;

h) the term of a certificate;

i) any special requirements that should apply to a broker which is an associate or affiliate of a local distribution company (LDC);

j) any restrictions to be imposed on the lead company of a multi-group direct purchase arrangement (which would act similarly to a broker);

k) the need for legislative changes or any other legal issue considered relevant; and

l) any other terms or conditions that should be placed upon a broker operating in Ontario.

1.13 The Board has considered the submissions and has concluded that the submissions were sufficient for it to make its final findings on the Applications. This Decision with Reasons deals with all the issues raised.

Related Proceedings

1.14 On December 9, 1985, the Board called hearings, on its own motions, to inquire into matters relating to interim contract carriage arrangements on the distribution systems of

each of Consumers', ICG and Union. These were given Board File Nos. E.B.R.O. 410, 411 and 412 respectively. The three proceedings were combined, commenced on January 27, 1986, and lasted for thirteen days. The Board issued its Reasons for Decision on April 4, 1986, (the Interim Contract Carriage Decision).

1.15 The Board, again on its own motion, held the Main Hearing to determine certain matters relating to contract carriage arrangements on Consumers', ICG's and Union's distribution systems in Ontario. The Main Hearing commenced on Monday, September 22, 1986, and the Board issued its Decision with Reasons on March 23, 1987.

1.16 In that Decision the Board decided that common elements of contract carriage and direct purchase arrangements should be dealt with first and a decision rendered before considering utility-specific rates. The bypass issue was differentiated from the other generic issues because of jurisdictional concerns and its potential impact on Ontario. Bypass involves the total avoidance of the LDC's system for the transportation of gas. The bypass issue was heard first and separate Reasons for Decision dated December 12, 1986, were issued under Board File Nos. E.B.R.O. 410-I, 411-I and 412-I for Consumers', ICG and Union respectively.

1.17 The Board found in that Decision "... that the Province of Ontario and this Board, as its delegate, has jurisdiction over bypass within Ontario." The Board stated, "... it is important to remove any uncertainty with respect to its jurisdiction and will, therefore, state a case to the Divisional Court of the Supreme Court of Ontario." The Divisional Court heard this matter on March 17 and 18, 1987. The Court rendered an oral Decision on March 18, 1987, confirming the Board's jurisdiction over bypass within Ontario.

1.18 In April 1987, Cyanamid Canada Inc. asked the National Energy Board (NEB) to review its December 1986 Decision regarding bypass facilities and to refer the question of jurisdiction to the Federal Court of Appeal. In November 1987, the Federal Court of Appeal found that the NEB did not have jurisdiction. Also in April 1987, the Lieutenant Governor in Council referred the jurisdictional question to the Ontario Court of Appeal. In February 1988, the Ontario Court of Appeal also found that Ontario has exclusive authority over "bypass pipelines similar to that proposed by Cyanamid".

1.19 In the Decision of March 23, 1987, the Board also made, inter alia, the following findings with respect to the role of brokers generally:

The Board finds that, subject to complying with all legal requirements in Ontario, brokers should be allowed to contract directly with the Ontario LDCs. It is only in this manner that open access to T-service can be achieved so that market responsive gas prices can be broadly obtained. (paragraph 3.25)

The Board finds that, if in compliance with Ontario legal requirements, brokers would be consistent with and will assist in the development of a competitive gas supply market in Ontario. (paragraph 3.40)

The financial soundness of brokers will be considered as part of the review undertaken by the Board before it issues a Certificate of Public Convenience and Necessity. (paragraph 3.42)

1.20 In that Decision, the Board also called for:

i) separation of each LDC's marketing function from its transportation function, noting that without such separation there exists the potential for cross-subsidization and for undue discrimination with respect to access to the LDCs' systems;

ii) continued regulation of transportation;

iii) an unbundling of traditional gas sales rates into components such as commodity, transportation, storage and load balancing;

iv) a move towards "cost-based" rates; and

v) the LDCs to design rates and allocate costs, for public hearing in the Summer/Fall of 1987.

Background

1.21 The Governments of Canada, Alberta, British Columbia and Saskatchewan recognized, in the Western Accord of March 28, 1985, on Energy Pricing and Taxation, a need for a more flexible and market-oriented environment.

1.22 Pursuant to this need, the Agreement on Natural Gas Markets and Prices (the 1985 Agreement) was signed on October 31, 1985, by those governments. Ontario was not a signatory. However, the OEB, based on evidence that a competitive market would be in the public interest, has supported the basic principles which underly the 1985 Agreement. They include:

- enhanced access for Canadian buyers to gas supply;

- enhanced access for Canadian producers to gas markets;

- after a twelve month transition period, freely negotiated prices for the purchase and sale of natural gas.

- protection for Canadian consumers for reasonable, foreseeable gas requirements; and

- commitment to foster a competitive market for natural gas in Canada.

1.23 The Board supported and continues to support the development of a competitive market for natural gas in Canada with open access to different sources of natural gas supply being essential to the development of this competitive market.

1.24 The then Federal Minister of Energy, the Honourable Ms Carney, issued a communique relating to the 1985 Agreement and stated:

> By November 1, 1986, all natural gas buyers and sellers in Canada will be released from unnecessary government intervention in the market place.

1.25 The intent of the 1985 Agreement was to create the conditions necessary for market-oriented pricing. The implementation, however, was left to the affected parties:

> It is the intention of the parties to the Agreement to foster a competitive market for natural gas in Canada, consistent with the regulated character of the transmission and distribution sectors of the industry...

1.26 The 1985 Agreement also recognized the importance of the pipeline link between the producer and consumer when it stated:

> Effective November 1, 1985, consumers may purchase natural gas from producers at negotiated prices, either directly or under buy-sell arrangements with distributors, provided distributor contract carriage arrangements are available in respect of such purchases. This provision is in no sense intended to interfere with provincial jurisdiction in regard to regulation of gas distribution utilities.

1.27 The twelve month period from November 1, 1985, to October 31, 1986, was designated as a transitional period to a fully market sensitive pricing regime. During this transitional period, wholesale prices prescribed by governments were frozen, but industrial customers without gas sales contracts with the LDCs were free to negotiate for the purchase of natural gas directly from producers. The availability of direct purchase was, however, conditional upon contract carriage arrangements being available from the LDCs. In December

1985, the OEB moved quickly to approve interim rates for transportation service (T-service or contract carriage) which were to remain in effect until a final decision of the Board.

1.28 To enable TransCanada PipeLines Limited (TCPL) producers to meet the competition of direct purchase, Competitive Marketing Programs (CMPs) were permitted, involving the end-user, the LDC, TCPL and its producers, effective November 1, 1985.

1.29 Direct purchase is an arrangement whereby an end-user of natural gas purchases gas directly from a producer or broker, rather than from an LDC. There are currently two methods of transporting directly purchased gas:

- o Buy-Sell: Wherein the LDC purchases the direct purchaser's volumes, commingles them with other purchased gas and sells to the direct purchaser as a sales customer under the appropriate rate schedule;

and,

- o Contract Carriage: Wherein the LDC does not take title to the direct purchaser's supply of gas, but contracts to carry the volumes of gas from the point of receipt through the LDC's system to the direct purchaser's take-off point.

1.30 CMP discounts are provided by system producers (i.e., those producers from whom TCPL purchases

gas) to individual end-users of gas in order to compete with brokers. The contractual gas supply arrangements between the system-producers, TCPL and the LDCs are unaffected. TCPL delivers and sells to the LDCs. The LDC provides TCPL with details each month of the volumes delivered to each CMP customer. TCPL rebates to the LDC the discounts on those volumes and the rebates flow to the customer as a credit on the following month's invoice. Market Responsive Price or Distributor Market Fund (MRP) discounts are similar to, but generally smaller than, the CMP discounts and approval by TCPL is not required. The specific rate resulting from each CMP and MRP discount is approved by the Board.

1.31 On December 3, 1985, the Ontario Minister of Energy announced Ontario's support for the introduction of interim contract carriage arrangements during the transitional period ending October 31, 1986. The Minister expressed his intention that, during this period, rates to other customers should not be adversely affected by the introduction of contract carriage arrangements.

1.32 In his statement of December 3, 1985, the Minister also requested the Board to carry out intensive studies during the transitional year to determine whether contract carriage rates could be continued beyond the transitional

period without adverse impact on other gas customers or on the integrity of the gas distribution systems.

1.32 These studies, which have been carried out, considered the impact of contract carriage on the cost allocation and rate design practices of the Ontario LDCs and surveyed the requirements of industrial gas users in Ontario.

1.34 Since the Interim Contract Carriage Decision of April 4, 1986, in excess of 50 contract carriage agreements, 200 buy-sell arrangements and 1000 CMP and/or MRP agreements have been approved on an interim basis by the Board, both with and without public hearings.

1.35 In May 1986, the NEB released its Decision on the availability of transportation services on the TCPL system (RH-5-85).

1.36 In that Decision changes were made to the tariffs of TCPL that would enhance access to its pipeline for volumes of natural gas purchased directly from producers by end-users or their agents. The displacement proviso in TCPL's transportation toll schedules, which dissuaded direct purchasers from obtaining transportation services when those direct purchases would displace volumes previously supplied by TCPL, was removed. In addition, the NEB determined that the duplicate demand

charges paid by direct purchasers was inappropriate and stated that the operating demand volume (ODV) methodology should be implemented to remove the "double demand charges".

1.37 The NEB Decision also determined that a distinction between "incremental" and "displacement" sales be made in order to define displacement volumes for tariff purposes. As well, a recommendation that non-system gas sales bear some portion of TOPGAS carrying charges was made.

1.38 TCPL appealed the NEB Decision; the Federal Court of Appeal confirmed the NEB Decision in a judgment released November 14, 1986.

1.39 Pursuant to the 1985 Agreement, an impartial Pipeline Review Panel (the Panel) was appointed to carry out a review of the role and operation of interprovincial and international pipelines engaged in the buying, selling and transmission of gas. The Panel, in its Report submitted on July 10, 1986, found market sensitive pricing to be feasible for both government and industry and implementable by November 1, 1986.

1.40 The Panel also made recommendations supporting the sanctity of contracts, but endorsing contract renegotiation and arbitration if appropriate. It recommended that the marketing

functions of pipeline companies be separated from their provision of transmission services. Support was also expressed for the availability of the option to bypass the LDCs' systems in the absence of reasonably competitive alternatives, subject to the approval of the provincial regulatory authority.

1.41 Revised pricing agreements among the system producers, TCPL and the LDCs in Ontario and Quebec were reached in September 1986. The agreements provided for a variety of discounts in the price of natural gas. These discounts were said to allow the LDCs to compete more effectively in the gas markets comprised of large volume commercial and industrial customers.

1.42 In November and December 1986, the Board issued Decisions relating to the LDC/TCPL memoranda of agreement with respect to revised pricing agreements between TCPL and the LDCs. The memoranda provided for a 20¢ per gigajoule (GJ) reduction in the cost of all contract gas purchased from TCPL from September 1986 to October 1988. They also provided for significantly larger discounts to be passed to certain commercial and industrial customers. These discounts, CMPs and MRPs, would be drawn from market funds provided and authorized by the producers and TCPL and mainly administered by each LDC. In these Decisions, the Board

indicated concern that the proposals could effectively require it to abandon part of its jurisdiction to others in that the proposals would result in the Board no longer fixing rates for those customers.

1.43 The Board also indicated concern in these Decisions that, based on the evidence before it, the proposed method of dealing with the market funds could lead to undue discrimination, which in turn could ultimately disrupt the industry. The Board concluded that it would be in the interests of all concerned if time were allowed for further negotiations of the contracts to bring about changes which would allow the Board to fully exercise its jurisdictional mandate.

1.44 The Board initially accepted the LDCs' proposals for six months; but in its Amendments to Partial Reasons for Decisions, extended this acceptance until October 31, 1987, because TCPL and the LDCs agreed, in letters to the Board, to renegotiate the respective agreements to address the Board's concerns. During this period the Board required all CMPs or specific MRP discounts to be submitted to the Board for approval. The Board also indicated that it would hold a hearing toward the end of October 1987 in order to review the progress made in the renegotiations.

1.45 In these Decisions, the Board established the following criteria by which the renegotiated agreements would be assessed:

- gas purchased by the LDC should arrive in Ontario without being streamed to specific customers or customer groups;
- the arrangements should permit the Board to determine the rates or end prices for customers and to give any necessary recognition to customer groups and market forces; and
- the market for gas in Ontario should be open and there should be access to transportation on TCPL's and the LDCs' systems.

1.46 The NEB's RH-3-86 Decision dated May 1987 gave Western Gas Marketing Limited (WGML), the marketing arm of TCPL, the ability to conduct its own direct sales. Previous to this Decision, TCPL/WGML was able to compete with direct purchases only through competitive marketing program arrangements with the LDCs and the end user.

1.47 In the Fall of 1987 the three major Ontario LDCs (i.e., Union, Consumers' and ICG) came to the Board with renegotiated pricing agreements with TCPL/WGML. The Consumers' and Union gas

cost pass-through proceedings were held concurrently in October and November after the hearing of cost allocation and rate design issues. The ICG hearing on the new pricing agreements was completed in early December 1987, after the hearing of cost allocation and rate design matters.

1.48 The Board, in its Decisions dated January 22, 1988, regarding the renegotiated pricing agreements, reluctantly approved the arrangements for one further year. The Board also found that all currently approved or to be approved CMP/MRP discounts or rebates shall not be approved beyond October 31, 1988.

The Participants

1.49 Letters of concern were received from the following municipalities:

Municipality of Cobden
Town of Fort Frances
Village of Madoc
Town of Massey
City of Port Colborne
City of Stoney Creek
City of Trenton
Township of Wainfleet
Town of Wingham

The letters are on the public file at the Board.

Active Participants

Board Staff	J. A. Campion
Associations and Companies:	
Canadian Petroleum Association (CPA)	A. L. McLarty R. A. Neufeld
Energy Probe	D. Poch G. Watkins C. McLeod
Industrial Gas Users Association (IGUA)	P. C. P. Thompson P. Doody
ATCOR LTD.	M. Hopkins
Brenda Marketing Inc.	M. Hopkins
C-I-L Inc.	P. Jackson R. van Banning M. A. Penny
The City of Kitchener	A. Ryder
Clerk of the City of Toronto	R. Feig
Consumers Packaging Inc.	B. Howell
Cyanamid Canada Inc. (Cyanamid)	J. Ryan E. A. Goodman R. Storrey
The Director, Investigation and Research, Competition Act, (the Director)	N. J. Schultz
Enron Canada Ltd. (formerly Consoligas Management Ltd.)	M. Hopkins

Great Lakes Forest Products	J. Davies
Nitrochem Inc.	P. Jackson R. van Banning M. A. Penny
Northridge Petroleum Marketing, Inc.	M. Hopkins
Polysar Limited	G. P. Sadvari J. M. Francis
Regional Municipality of Ottawa-Carleton	W. E. Duce J. O. Cameron
Southwestern Ontario Municipal Committee	A. C. Wright
TransCanada PipeLines Limited (TCPL)	M. Brown
Distributors:	
The Consumers' Gas Company Ltd. (Consumers')	R. S. Paddon P. Atkinson
ICG Utilities (Ontario) Ltd. (ICG)	J. Roland
Union Gas Limited (Union)	L. Robinson B. H. Kellock D. Sulman

Other Submittors

1.51 The following parties filed written submissions with the Board in accordance with the Board's invitation in Procedural Order 7, dated June 8, 1987.

AEC Oil and Gas Company (AEC)

Alberta Petroleum Marketing Commission (APMC)

The Consumers' Gas Company Ltd. (Consumers')

The Director, Investigation and Research, Competition Act (the Director)

Direct Energy Marketing Limited (DEML)

ICG Utilities (Ontario) Ltd. (ICG)

Independent Petroleum Association of Canada (IPAC)

Northridge Petroleum Marketing, Inc. (Northridge)

ATCOR LTD. (ATCOR)

Enron Canada Ltd. (Enron)

Brenda Marketing Ltd. (Brenda)

PSR Gas Ventures Inc. (PSR)

Shell Canada Limited (Shell)

Union Gas Limited (Union)

Western Gas Marketing Limited (WGML)

Bruce F. Willson, Energy Advisor to the Consumers' Association of Canada (CAC)

2. THE ISSUES

Introduction

2.1 In this section the Board addresses the twelve issues identified in its Procedural Order 7 of June 8, 1987.

2.2 The Board refers to the Applicants also as the "Brokers", although in many circumstances the term "brokers" in effect could include intervenors such as PSR, which is an LDC-affiliated broker, or Shell which is both a major producer of system gas and an independent marketer of gas.

2.3 When describing the positions of parties, the Board has used the word "core" in the same manner as the intervening party has used it. The Board has not changed its definition of "core" which it set out in the Decision of March 23, 1987, and relies on it throughout the Board's Findings in this Decision. The Board

defines the core market as "those volumes that are sold by the LDCs, excluding buy-sell volumes".

The Role of Brokers in Ontario

2.4 The Brokers submitted that they should have access to all market segments and be able to contract for space on the LDC's system as well as on TCPL's system. They maintain that a broker, by contracting for unbundled services and taking advantage of the diversity of the load patterns of its customers, is able to perform all of the load management services which the LDC provides. Furthermore, they submitted that by selectively grouping customers and operating across different utility systems, a broker can achieve unique efficiencies.

2.5 The Brokers also said that if the marketing and transportation functions of the LDC are not separated they will have difficulty working with the LDC to supply end-users, since the LDC also wants to sell its gas and, by implication, may restrict transportation to achieve that end.

2.6 The Brokers emphasized that the principles of open access to transportation for buyers, sellers and brokers is fundamental to the development of an efficient and effective competitive marketplace for gas. They

maintained that brokers offer experience and expertise in bringing buyers and sellers together and offer a broader range of services. Thus they have concluded that brokers enhance competition in the marketplace. In their view, the presence of brokers in the marketplace would bring about the supply and demand for gas at competitive prices, a situation which directly benefits end-users in Ontario.

2.7 Shell noted that it considers itself a "marketer" of gas and that it acts as a principal as opposed to an agent or consultant. Shell views the role of a broker acting as a principal to be able to handle all aspects of an end-users's load management under a single contract. By grouping several end-users' loads, a broker may be able to achieve a lower overall T-service rate for each end-user customer. Shell sees LDCs as uncooperative and a "stumbling block" since they are active in the sale of gas, a function which is not yet separated from the transportation role of the LDC. Shell also noted that existing legislation makes it difficult for a broker to become a principal in the sale of gas in Ontario.

2.8 WGML submitted that the Board should find that there is a substantial "core" market requiring regulatory and legislative protection, and that there is a "non-core" market that should be left to its own devices. WGML submitted that,

by permitting the LDCs to retain the exclusive franchise to the "core" market, the need to regulate broker activity would be lessened. It submitted that brokers should not serve the "core" market directly, but anticipated that brokers could supply LDCs.

2.9 AEC submitted that the role for brokers should be only in the "non-core" market in Ontario.

2.10 IPAC submitted that brokers constitute important suppliers of gas and accordingly require access to transportation and to those customers who are able to contract directly and accept the risks for their own supply. A national consensus definition of the "core" market is of critical importance, IPAC said, since there should be regulatory protection for the "core", ensuring, for example, that terms of contracts are maintained at appropriate levels in order to prevent "abnormal distortions" in the marketplace. It believed that the LDC should be designated as the exclusive supplier to the "core" market, although it saw the potential for the brokers to sell to LDCs. IPAC supported the Brokers' applications for certificates, subject to the condition that they serve only the "non-core" market. IPAC submitted that brokers should be exempt from Section 8 of the Municipal Franchises Act.

2.11 The APMC suggested that the role of brokers not be expanded beyond the present role of facilitating direct purchase by "non-core" customers, at least until the market is stabilized and supply and demand for gas are in balance. It held that there should be sanctity of contract to protect TCPL, its suppliers, TOPGAS, and Canada's international reputation.

2.12 Consumers' submitted that the most important roles of a broker are to group small users together and to allow them access to markets or to seek out producers on behalf of consumers. Consumers' held that brokers can fulfill these roles as agents without being principals in the sale of gas, or principals in contracts for T-service.

2.13 ICG categorized the industrial and large commercial markets as high risk and the heat-sensitive residential and small commercial market as low risk. It submitted that the Board may require more regulation of brokers seeking to serve the low risk market, presuming that the Board will find it necessary to protect customers in such a market from the consequences of financial or gas supply failure on the part of brokers.

2.14 Furthermore, ICG maintained that if a broker seeks to supply the same services as an LDC, e.g. storage, it will be acting as an LDC and

should be regulated as one. ICG did not distinguish between the sale of such services by the entity which owns and operates them, and resale of such services by others. ICG held that prices to the residential and small commercial users should be regulated for both LDCs and brokers, and that prices for gas, the commodity, to large industrial users should not be regulated. It reasserted that, if brokers are allowed to "cherry pick" (i.e. select and sell to customers having the best load factors), then any resulting higher cost of gas must be passed on to the LDC's remaining sales customers. It anticipated potential gas management problems as brokers enter the LDC system, and proposed that the Board should monitor this to ensure that the system is operated in the public interest.

2.15 Union accepted the concept of entering into carriage service contracts with brokers who are acting as agents. It pointed out that brokers will aid end-users and may promote gas-on-gas competition or may, in fact, lead to decreased gas consumption in Ontario because brokers can also market other fuels. It asserted that it would be to the detriment of the entire gas industry if there is a decrease in gas usage. Union said it would be indifferent with respect to the range of services offered by the broker as long as the resultant operating demand reduction is customer-specific and may be

identified for the purposes of reducing Union's operating demand with TCPL.

2.16 The Director submitted that the potential for competition throughout the market should not be artificially restricted; and that the objective should be to have an unsegmented market and a supply/demand balance that will bring about the efficient usage of Canadian resources. The Director submitted:

> It was and is the position of the Director that the October 31, 1985 Agreement on Natural Gas Markets and Prices intended the benefits of competition to accrue to all Canadians. There is nothing in the Agreement that would suggest that the benefits of competition are to be confined to any particular segment of the Market. To ensure that benefits of competition can be enjoyed by all - and not just large end users - it is essential that brokers be given access to the distribution system.

2.17 Board Staff submitted that the brokers' essential role is to facilitate a more competitive gas market. For the purposes of these deliberations, Staff defined a broker as "any person that holds title to natural gas for resale in Ontario or who contracts for space in an LDC's system on behalf of another party". Such a definition would include LDCs acting as brokers, but according to Staff it was not intended to apply to brokers acting as agents.

Benefits which brokers bring to Ontario consumers, according to Staff, include: the opportunity for all consumers to freely select a gas supplier (i.e. freedom of choice); an enhancement of overall security of supply through the diversity which brokers will bring to the marketplace; and the ability of an individual consumer to individually tailor portfolios of service.

The Board's Findings

2.18 A "broker", for purposes of this proceeding, is a person who sells or trades in, or offers to sell or trade in, gas and is not a transmittor or a distributor regulated by this Board. In other words, a broker does not own or operate the works which transmit or distribute gas, but may operate either as an agent or a principal in the sale of gas.

2.19 In its Decision of March 23, 1987, paragraph 3.25, the Board found that, subject to complying with all legal requirements in Ontario, brokers should be allowed to contract directly with the Ontario LDCs for T-service as a necessary adjunct to achieving market responsive prices for a wider spectrum of customers. Furthermore, in paragraph 3.40 the Board found that, if in compliance with Ontario legal requirements, brokers are consistent with, and will assist in

the development of, a competitive gas supply market in Ontario.

2.20 To be "competitive" a marketplace requires, among other things, many buyers and many sellers. In the marketplace for gas, brokers will be part of the "many sellers", either acting as principals in the sale of gas, or as agents for others.

2.21 The Board reiterates its support for brokers being permitted to participate openly and equally in the sale and resale of gas in Ontario. In the following paragraphs the Board comments on some of the concerns raised by intervenors with respect to the role for brokers.

2.22 The Board agrees that to participate effectively a broker must be able to buy the various services from the LDC in an unbundled form. This has been and continues to be the subject of other proceedings before this Board.

2.23 The Board continues to prefer the functional definition of the core market which it adopted in the March 23 Decision, i.e. that, with the exception of buy-sell volumes, the core market includes any volumes of gas purchased from an LDC. No artificial or discriminatory segmentation of the market accompanies this definition, since any existing LDC customer may

purchase gas from another supplier, assuming someone will offer to supply.

2.24 The concerns of ICG and others over "cherry picking" could be justified if the LDCs could not compete with brokers. However, under a full separation of the transportation and gas sales functions of the LDC, the gas sales arm of the LDC, making direct sales, would be able to compete with brokers. The Board believes that the gas prices for high load factor customers ("cherries"), determined in a workably competitive marketplace, will be fair; just as will be the somewhat higher prices that result from competition to serve low load factor customers. How much higher such prices might be for low load factor customers remains to be seen when and if open access and workable competition come about.

2.25 In its gas cost pass-through Decisions of January 1988, the Board identified three major factors that will impede the development of a competitive market:

- the long-term contracts between TCPL and the LDC and the inability of the latter to self-displace contracted volumes with gas from other sources, thus preserving TCPL's monopoly;

- the present TOPGAS arrangemnts and the potential additional problems arising when the moratorium on "take or pay" ceases in 1988; and

- the Alberta Government's policies on removal permits.

2.26 In order to permit others to sell gas on an equal footing with the LDCs, the Board believes that it must be possible for them to have access to gas, storage, and various types of transportation service in varying amounts, and to repackage them for resale. To do this effectively the intermediate party (the "broker" or marketer) must be able to buy and sell gas and transportation services without unnecessary restrictions.

2.27 In the Board's view, it remains to be seen whether, as suggested by some, transportation efficiency will suffer. Essentially the same volumes are expected to continue to flow on the transportation systems. Any change in the mix of transportation service on a system may be dealt with through appropriate pricing signals for transportation, or through some facilities additions or system reconfiguration, or through a combination of these measures. Depending on the mix of storage and TCPL transportation remaining for the use of LDC sales customers, LDC customers may face some changes in costs.

As for transportation efficiency on TCPL, the Board must presume that the efficient use of TCPL's system will derive from appropriate pricing for its services. Ontario has always had to take TCPL transportation costs as exogenous costs incorporated into the cost of gas arriving in Ontario.

Financial Assurances or Tests

2.28 The Brokers took the position that in a mature market there would be no need for special financial tests; the utilities' concern over financial soundness would be the same for brokers as it would be for other customers seeking service. The Brokers suggested that any tests imposed by the Board should be considered an administrative guideline and not a final judgment. A broker should be able to meet the test either by a proven track record or by its financial strength or that of its parent (considering all revenue sources). Furthermore, the Brokers submitted that all financial information should be provided on a confidential basis, since brokers have no responsibility to act in the public interest and could be hurt by disclosure of such information to competitors. (Some or all of the above views were expressed also by AEC, DEM, and Shell.)

2.29 The LDCs noted that a broker acting as an agent deals only with the end-users, and any financial requirements are "between them". They maintained, however, that a broker acting as a principal should, in buying services from the LDC, be subject to the same requirements as any LDC customer, and perhaps to greater scrutiny of its financial capability due to "increased exposure". They submitted that the LDC should be protected from default in payment, such as by a guarantee of payment for two months of services. They asked the Board to confirm that a customer who purchases directly is to be wholly responsible for its own security of gas supply; and, furthermore (recommending legislation, if necessary), that the LDC would have no obligation to a broker who was in default. The LDCs submitted that, as a condition of the certification, brokers should be required to furnish evidence of financial stability.

2.30 In Union's view, prior to issuing a certificate the Board may wish to inquire into: financial structure of the broker; establishment of a performance bond; level of financial protection; quality of supply and transportation commitments; quality of reserves; supply backups; level of commitment to serve; and ability to remove gas from a producing province.

2.31 WGML saw no need for tests, provided the "core" market is not serviced by brokers.

2.32 IPAC proposed the financial test for brokers should be the same as for end-users or producers serving the "non-core" market, and that the Board should ensure that gas supply is adequate.

2.33 Board Staff submitted that brokers should be allowed to operate as principals only if no costs are imposed on other users as a result of a business failure by a broker. Staff saw financial tests or assurances as the best method of guarding against such an eventuality. They preferred the requirement of a bond or letter of credit (payable to the Treasurer of Ontario), covering two months' costs for both supply and transportation since it would involve the Board in a less active on-going role. The alternative, they said, would be to have brokers file financial statements, publicly, on an ongoing basis. Under such an alternative, Staff claimed, the Board would have complete discretion to review such statements and to cancel or suspend a certificate. Board Staff held that the suspension or revocation of a certificate should be subject to the fulfilment of then existing obligations of the broker to its customers, but should also free the customer from obligations to the broker in order to permit it to seek gas supply elsewhere.

The Board's Findings

2.34 An LDC may seek from brokers the same financial guarantees and assurances it would seek from any other transportation or storage customers on its system. For example, a bond or letter of credit for a two month period, similar to that required on the TCPL system, would be appropriate.

2.35 In reviewing a broker's application for a certificate, the Board may require an appropriate bond or letter of credit or may accept such other assurance of financial stability or soundness as the applicant may produce. If the Board is asked to rely on financial information other than a bond or letter of credit, it may be difficult to have such information remain confidential.

2.36 The Board may, when initially certifying a broker, examine all relevant circumstances of the broker.

Contribution of Brokers to Promotional Activities for Natural Gas

2.37 The Brokers and Shell submitted that neither the broker nor the LDC should be able to incur costs on behalf of the other; hence, that brokers should not be required to pay for any

advertising or promotional activities for natural gas which may be incurred by others.

2.38 The LDCs essentially took the view that gas is "generic", that advertising costs incurred by the LDCs are for the benefit of all gas users and should be shared equitably, and that such costs should be considered to be distribution costs.

2.39 Board Staff proposed that, as long as advertising by the transportation arm of the utility is "generic", such costs may be approved by the Board; however, advertising by brokers, including brokers owned by LDCs, should be at their own cost.

The Board's Findings

2.40 The Board recognizes that there may be some overall efficiencies in carrying out generic advertising for natural gas either through an industry organization supported by contributions from its members, or through the transportation arm of the LDC. The appropriateness of incorporating such generic advertising costs in the transportation (and storage) rates will be dealt with as it arises as an issue in an LDC rate case. The LDC should not presume that such promotional costs will automatically be approved by the Board for inclusion in

transportation rates. The LDC should provide adequate support for such a proposal.

Security of Supply

2.41 The Brokers generally took the position that a direct purchase customer should assume responsibility for its own security of supply. They submitted that an LDC should not be required to backstop a direct purchaser. However, one broker observed that under a force majeure situation it is expected that "all stops would be pulled out, as has happened in the past, with priority as established by the OEB guidelines". Brokers noted that the "core/non-core" distinction is artificial. However, assuming that "core" users have a greater need for security, they observed that responsible brokers would contract for longer terms on their behalf, just as LDCs do.

2.42 WGML maintained that the responsibility for security of supply for the "core" lies with the franchise holder.

2.43 AEC submitted that provincial public utilities boards should require all distributors to demonstrate that they have sufficient gas under contract.

2.44 The APMC said that requirements placed on brokers should reflect the market served, and that a reserve life of 10 years or less should not be considered adequate for the "core" market.

2.45 Shell submitted that core customers should be able to rely on the Board to ensure gas supply is adequate by reviewing warranty of delivery, priority of service, and access to storage or load balancing services.

2.46 Union submitted that it is inappropriate to segment the market for the purpose of determining the Board's responsibility with respect to security of supply. However, Union suggested that a review of security of supply might include verifying that long-term sales contracts are in place, deliveries are under firm service, supply removal from the producing province is on a reserve basis, and adequate supply exists. Union proposed that failure to supply by a broker should bear a substantial penalty or result in revocation of its certificate. Whereas the LDC should not be required normally to back up a broker's supply, Union identified a need for a pro rata formula for sharing a partial supply failure among many end-use customers.

2.47 Consumers' noted that if the "core" is the responsibility of the LDC, the LDC will be able

to seek long-term, competitive, contracted supplies to give this sector stability. Consumers' stated that if an LDC is required to maintain a contracted backup or standby supply for customers that do not normally buy gas from it, it should be a limited backup supply service and a fee should be charged. Consumers' foresaw that this would require extensive cost studies. If all markets were to have unlimited access to direct purchase, Consumers' said that the Board might review arrangements for the "core" market to ensure adequate security is in place.

2.48 The Director submitted that a supplier of gas in Ontario must have adequate T-service and production arrangements in place, but that any required reserves check should be done in Alberta.

2.49 The Consumers' Association was seriously concerned with the ability of brokers to provide a long-term security of supply, and proposed closer scrutiny of supply adequacy by the OEB.

2.50 Board Staff submitted that there should be no market segmentation on the basis of security of supply, the principle of "buyer beware" should operate, and if producing provinces adopt a "core/non-core" market approach, this should not influence the OEB. Board Staff saw a need to consider whether brokers can offer daily

security of supply. However, it submitted that the Board should not set any hard and fast rules for daily backstopping capability, at present. The greatest scrutiny, according to Staff, should be given to those brokers wishing to provide gas for essential services, and brokers providing gas for essential services should show a high degree of daily backstopping, which may be arranged either through an LDC, other brokers, or through the interruptibility of other customers. Board Staff submitted that some risk should be acceptable, however, considering the benefits.

The Board's Findings

2.51 Security of supply for each customer in Ontario depends on several factors. In any short-term period, security of supply depends on pipeline capacity on the LDC system, on TCPL's system and the supplying provinces' gathering and transmission systems, and on the capacity of gas plants and producibility of gas reserves. In the longer term, security of supply depends on the total reserves available to meet demands.

2.52 Security of supply also depends on contractual relationships to which the customer and its suppliers are party, on proration agreements to the extent they exist, and on the price the customer is willing to pay.

2.53 Although there has been a general thrust toward letting gas supply and demand, and the resultant prices, be determined by the interaction of buyers and sellers in the marketplace, it is clear from past experience that the policies of governments in the producing and consuming provinces can have an impact on security of supply.

2.54 Some parties would prefer to rely on the marketplace to determine prices and to let the prospect of future prices, together with appropriate contractual relationships, determine the rate at which new gas supplies become available. In pursuing the objective of security of supply, other parties prefer that governments mandate a linkage between customers and reserves through contracts.

2.55 In the Board's view, if workably competitive markets for gas as a commodity could be achieved in Canada, price would be a satisfactory allocator of gas supply. Buyers would buy the security of supply they want through the price they would pay and through contractual arrangements into which they would enter.

2.56 A customer that chooses a gas supplier other than the LDC and requires supply security can invite bids and negotiate for short or long-term security. In this manner the appropriate value of supply security will be reflected

contractually on an individual basis and be borne as a cost by the user requiring it.

2.57 The Board believes that in moving toward an open, competitive market those who choose to use a source of supply other than the LDC must accept responsibility for their own security of supply. Such responsibility should not devolve upon the LDC in the event of supply shortfall, nor upon this Board under its legislation.

2.58 In issuing a certificate, the Board will require that all customers purchasing gas from brokers in Ontario be given advance written notice that beyond the ability of the broker to effect supply, the customer assumes the risk of finding its own supply; there is no guarantee that the LDC will be able to sell it gas once it has ceased to be a gas customer of the LDC.

Information Reporting Requirements

2.59 The Brokers generally accepted that it may be important for the Board to have volume information, but that the Board should only be concerned with the pricing by the regulated LDCs. Dissemination of price information is inconsistent, they said, with a competitive market and does not occur in any other market. They believed a posted price would reduce competition.

2.60 Shell submitted that a broker should be exempt from OEB regulation under Section 19 of the Ontario Energy Board Act (the Act), and that, as such, no price reporting should be required. It said that contracts with "non-core" customers should not require Board approval. However, it proposed that all contracts with "core" customers should be submitted on a confidential basis for approval by the Board.

2.61 WGML emphasized that any information required by the Board should be held strictly confidential.

2.62 IPAC submitted that the information filing requirement for brokers should be the same as those for end-users or producers.

2.63 The LDCs asked for a thorough reporting of broker information concerning sales of gas. Consumers' said that public disclosure of information may be desirable to allow "non-core" users to assess the viability of a potential supplier. ICG called for monitoring of broker activities by the Board and the filing of sales contracts with essentially all terms being made public. Union submitted that a broker should be subject to the same filings as an LDC, and specifically should provide periodic financial information and should advise the Board of any additional charges beyond the specified price of gas.

2.64 The Director submitted that the Board should obtain information on volumes, price and term of contracts.

2.65 Board Staff proposed regular reporting of financial information (presumably either the status of bonds or letters of credit, or other information to assure financial strength); evidence of continued suitable security of supply for customers providing essential services; and price and volume information for all sales. Board Staff submitted that the Board should publish aggregated pricing information, based on brokers' confidential filings of transactions.

The Board's Findings

2.66 From time to time, in order to assess the nature of competition in the marketplace for gas, the Board may require information on price, volume and terms of sale.

2.67 The Board currently holds the view that sources of relevant market information are evolving as progress is made toward more competitive non-regulated gas markets, and that it is inappropriate for the Board to compile and issue such information at this time.

Obligation to Serve

2.68 The Brokers maintained that a broker is a private commercial interest and should have no obligation to serve. They said that, since brokers will not enjoy monopoly positions, the public will not require protection from them. Shell also took this position.

2.69 AEC stated that LDCs should have the exclusive right and obligation to serve "core" markets.

2.70 WGML submitted that if "core" markets are served by a sophisticated entity holding a franchise, there is no need for brokers or other gas suppliers to have an obligation to serve.

2.71 Consumers' position was that there will always be a "core" market which wishes to purchase gas from the LDC, and that this market must be defined so that, concurrent with the obligation to serve, will be the ability to contract with relative certainty for long-term supplies. Assuming that the LDC will continue to have a monopoly to provide distribution services (transportation and storage), and that brokers will not be allowed to lay pipe, Consumers' submitted that the LDC will have an obligation to provide distribution services. Furthermore, Consumers' asserted that LDCs should look to contractual assurances to recover capital invested in new facilities, and suggested that

the Board will have to consider what rate base treatment is appropriate for facilities made redundant by termination of T-service. It suggested that such facilities should remain in rate base.

2.72 ICG suggested that brokers serving residential and small commercial users should have an obligation to continue service for a period equal to the remaining term to expiry of the longest remaining LDC's supply contract for similar markets. Conversely, ICG held that LDCs no longer having a monopoly on sales should not be under any obligation to serve. Specifically, ICG maintained that there should be no obligation to provide sales service to direct purchasers. Furthermore, it held that only an LDC should be able to build distribution facilities.

2.73 Union observed that obligations to serve are defined by the terms of contract. They contended that an LDC should not be required to contract with a broker if such service cannot be reasonably accommodated, i.e. there should be no absolute obligation to serve a broker.

2.74 The Director observed that the concept of "obligation to serve" has no application to unregulated sales of gas in a competitive market place. He said the LDC should not be required to maintain gas purchases in excess of

requirements for its own regulated sales customers, and that there should be no guarantee of "re-entry" to the LDC sales system.

2.75 Board Staff submitted that the obligation to serve can only be enforced on a distributor who enjoys a monopoly, and hence can only be enforced with respect to transportation and storage services. They maintained that an obligation to supply gas ought not to be imposed on any broker or on the LDC. Staff suggested that a broker should be able to cease supplying gas under a contract only by obtaining an order from the Board, and should be required to give notice of its intentions with respect to continuing gas supply on expiry of a contract, at a set period of time before that expiry. Furthermore, as a transition provision, they suggested that any portion of a distributor's system which is idled by termination of broker service should remain in the rate base.

The Board's Findings

2.76 The Board sees no reason for anyone other than Board-regulated transmittors, distributors and storage companies to lay pipe or transport or store gas. By having such a monopoly, LDCs should continue to have an obligation to provide transportation service within their franchised area. However, the obligation to supply gas should arise from contractual

obligations of customers with an LDC or a broker. Legislation may be required to clarify the obligation of an LDC to supply gas.

The Obligation to Provide Maintenance and Other Services to End Users

2.77 Brokers, LDCs, and Board Staff generally held a common view: that user-owned facilities are the user's responsibility. They held that there is no obligation to provide service downstream of the meter outlet presently, that this situation should continue, and that obligations to provide service downstream of the meter should arise, if at all, only by contract.

2.78 Board Staff submitted that LDCs should continue to provide maintenance of physical plant, end-use equipment and related services since they are the physical operators and owners of the distribution system and have the expertise. They held that brokers should have no role in providing such maintenance and other related services.

The Board's Findings

2.79 The Board agrees with the submissions of many of the parties that there is no obligation of an LDC or a broker to provide maintenance and

other related services to end use customers downstream of the meter outlet, and that any obligations to provide service downstream of the meter should arise by contract.

2.80 The Board recognizes that the LDCs have traditionally carried out certain designated inspection duties for the Province of Ontario with respect to the safety of services provided downstream of the meter outlet, and has no reason to presume that these would not continue.

2.81 With respect to maintenance and other services related directly to the LDCs' transportation and storage system, the LDCs will continue to carry full obligation and responsibility.

Term of Certificate

2.82 The Brokers, in general, saw no rationale for restricting the term of a certificate. They suggested that, in any event, it should be not less than would be awarded to an LDC, but should be subject to the understanding that the Board would be able to revoke it.

2.83 WGML claimed that with an exclusive franchise there is no need for brokers to obtain certificates.

2.84 Consumers' held the view that some mechanism is required for withdrawal or expiry of

certificates after a short period, subject to renewal. In its view, the length of T-service a broker could offer as a principal would be limited by the term of the certificate, but it did not believe that the term of the certificate would necessarily constrain the term for which gas could be offered, nor the ability to recover costs of new investment where required.

2.85 ICG suggested that the certificate should be issued for a term equal to the period in which there is an obligation to serve, otherwise for as long as there are customers in the municipality being served by the broker.

2.86 Union emphasized that the Board has the power to revoke a certificate if it is in the public interest to do so.

2.87 Board Staff suggested that certificates should initially be issued for a probationary term of two years. After that, longer term certificates might be issued at the Board's discretion (5 to 10 years), always with the right to suspend or revoke.

The Board's Findings

2.88 The Board is prepared to issue certificates of public convenience and necessity for terms similar to those which would be issued to LDCs.

Special Requirements Applicable to LDC Affiliated Brokers

2.89 Generally, non-LDC affiliated Brokers submitted that, provided that there is full separation of the utility operations and the gas sale function, there need be no special requirements. Northridge further submitted that utilities should not be allowed to be affiliated with brokers.

2.90 Shell agreed with the Brokers' submissions, emphasizing the need for the marketing arm to be distinct from the transportation arm of an LDC.

2.91 PSR, which is an affiliate of Union, submitted that where the Board fulfils its statutory obligations, customers will not be disadvantaged by a transaction between an LDC and an affiliate, especially after passage of legislation similar to Bill 142, the Ontario Energy Board Amendment Act, 1986, which provides for filing of quarterly reports and other information. [The Board notes that the Bill was not enacted.] It submitted that affiliated transactions should be treated no differently than non-affiliated transactions, other than making sure they are not secret. Furthermore, it held that any ban, restriction, special rule or standard would be wrong and contrary to the intention of the government

because: (a) it would discriminate against shareholders, (b) unnecessary and inappropriate reimposition of regulations would occur, and (c) the Board can protect consumers through its legislative mandate. Hence, PSR saw no need to impose special requirements on a broker which is an affiliate of an LDC.

2.92 WGML submitted that LDCs and marketing affiliates should maintain separate management, separate accounting, and separate personnel in all areas, and that the relationship should be subject to regulatory scrutiny.

2.93 The LDCs all held the view that the rules should be the same for all parties acting as brokers, i.e. that there should be no special requirements.

2.94 The Director submitted that affiliates should be separated and required to contract with the LDC.

2.95 Board Staff submitted that if the LDCs proceed with separation, no special requirements will be needed.

The Board's Findings

2.96 As long as there is full separation of the affiliated brokerage activities from the distribution operations of the LDC, there is no

apparent need for special requirements to be imposed on an affiliated broker at this time, beyond those which are imposed now for other purposes; such as those pursuant to undertakings which have accompanied Lieutenant Governor in Council approval of recent gas utility takeovers. If there is not full separation of the brokerage affiliate from the LDC, problems will likely arise in the allocation of gas costs and in the allocation of common costs of other operations. The Board will deal with any such problems in a rate case.

Restrictions to be Imposed on the Lead Company of a Multi-Group Purchase Arrangement

2.97 Brokers took the position that if the lead company sells gas in Ontario it should be treated as a broker with the same requirements as other brokers. On the other hand, they maintained that if there is no sale, the Board has no jurisdiction. Shell also held this view.

2.98 WGML submitted that multi-group purchases within the "core" should be precluded, and that multi-group purchases for the "non-core" markets should simply be administered through contracts.

2.99 Consumers and ICG both submitted that a lead company acting as a broker should be subject to

the same rules as other brokers, but pointed out that there are situations where a lead company may be acting, but not as a principal in the sale of gas in Ontario, for example under a buy-sell arrangement. Union pointed out that it requires companies involved in multi-group purchases to assume joint and several responsibility, so that there is no "lead company", and presumably no sale of gas in Ontario from one company to another.

2.100 Board Staff assumed that the lead company in a multi-group purchase arrangement would be a broker and would have to comply with the requirements placed on other brokers.

The Board's Findings

2.101 The lead company in a multi-group purchase arrangement may or may not be a principal for the sale of gas in Ontario. If it is, then it must abide by the requirements placed on all other brokers. Otherwise, if it is simply the spokesperson or agent for others making purchases of gas or services, the Board would have no jurisdiction to impose restrictions.

Legislative Changes Required

2.102 The Brokers submitted that there is a need for legislation which distinguishes between owners

of pipelines and sellers of gas, and noted that current legislation, which was intended to cover only pipeline companies, in fact captures everyone that sells gas. Although new legislation is desirable, they submitted that the admission of brokers as sellers in Ontario should not depend on such legislation. The Brokers have endeavoured to obtain franchises from certain municipalities and, if the certificate eventually granted cannot constitute an order under Section 19(8) of the Act, as some have suggested it can, it should nonetheless be possible to exempt brokers, by way of regulation, from the restrictions and/or obligations of distributors under the Act. They submitted that, if the Board were to grant certificates to brokers, and if the Board were to give brokers its active assistance, franchises could be obtained from all municipalities. In any event, if legislative changes were made, the Brokers presumed that the Board would maintain the right to divert gas to the most essential services.

2.103 Shell made no specific recommendations for legislative change, but made detailed recommendations similar to Board Staff, saying that: brokers should be exempt from the operation of Section 19 of the Act; the Board should write all municipalities explaining the advantages of brokers and asking the

municipalities to pass a standard form by-law; the Board should grant Certificates of Public Convenience and Necessity approving the supply of gas by the Applicants in all Ontario municipalities; and, as by-laws are received by the Board from the municipalities, granting the right of a broker to sell gas, the Board should dispense with the assent of municipal electors under Section 9(4) of the Municipal Franchises Act, and should approve such by-laws. Shell held that the Board should not wait to receive by-laws from every municipality before proceeding, since to do so might needlessly delay the benefits of market responsive pricing for natural gas users in Ontario. Shell accepts the certificate conditions suggested by Board Staff, with the exception that only contracts for gas sold into the "core" market need be filed.

2.104 WGML noted that significant changes would be required in order to adopt its submissions, but declined to comment specifically on legislative changes.

2.105 Consumers' submitted that viable brokerage operations would benefit the industry as a whole, but said that the operation of brokers should not be fitted into existing legislation meant for distributors, nor should existing legislation be amended on a piecemeal basis; rather the "new circumstance should be

recognized on its own in legislation to avoid future misunderstanding, misinterpretation or litigation".

2.106 ICG went to great length to restate its interpretations of the current legislation, some of which are still at odds with recent decisions of the Board. ICG continues to hold the view that, if brokers are permitted to sell gas as principals, the price at which gas is sold should be regulated in the public interest in the same manner as the price of gas sold by the LDCs. Hence, with respect to any regulation to exempt brokers from the need for rate orders, ICG submitted that LDCs should also be exempted.

2.107 Union observed that the need for legislative changes, if any, is dependent upon which specific role the Board defines for brokers in Ontario. It referred the Board to scenarios of legal changes which it described in its final argument in E.B.R.O. 412-II.

2.108 The Director noted that existing legislation with respect to franchising was never intended to deal with the situation which has emerged, and could be replaced by a reasonable form of licensing for brokers engaged only in the marketing of gas, as distinct from the construction of facilities.

2.109 Board Staff noted the Board's Reasons in the March 23 Decision (pages 4/1 to 4/21). It submitted that new legislation should be requested, and among other things: (a) a Certificate of Brokerage should be defined; (b) brokers should be exempt from the municipal by-law requirement; (c) the Board should be able to grant a province-wide Certificate of Brokerage subject to conditions which it determines appropriate; (d) it should be made clear that there is no legislative obligation on a broker to serve outside its actual contract with the consumer; and (e) the Board should have the power to revoke, suspend or reinstate a Certificate of Brokerage in the public interest at any time, without compensation to the holder of the certificate, after the holding of a hearing.

The Board's Findings

2.110 In the March 23 Decision the Board made the following findings with respect to brokers:

> ... subject to complying with all legal requirements in Ontario, brokers should be allowed to contract directly with the Ontario LDCs. ... (Paragraph 3.25)
>
> ... if in compliance with Ontario legal requirements, brokers would be consistent with and will assist in the development of a competitive gas

> supply market in Ontario. ... (Paragraph 3.40)
>
> ... it is desirable that brokers of gas be allowed to act as agents or as principals to sell gas in Ontario. ... (Paragraph 4.2)
>
> ... The legislative scheme intended to regulate any person who supplied gas in Ontario. ... (Paragraph 4.13)

2.111 The existing legal requirements include:

- a certificate of public convenience and necessity to enable a person to supply gas in a municipality (Section 8, Municipal Franchises Act);
- a by-law from the municipality to and in which a person wishes the right to supply gas (Section 3, Municipal Franchises Act);
- prior approval of the by-law by the Board (Section 9, Municipal Franchises Act); and
- a Board order permitting a distributor ["a person who supplies gas ... to a consumer ...", Section 1(1)4], which includes a broker, to sell gas (Section 19, Ontario Energy Board Act).

2.112 The Board further found in its March 23 Decision:

> ... that the existing regulatory scheme is inappropriate for brokers. The Board recommends that the Ontario Energy Board Act be amended to provide regulatory mechanisms for brokers. (Paragraph 4.109)

2.113 Therefore, with respect to brokers, the Board recommends that new legislation be enacted to regulate brokers as marketers of gas. The provisions of the brokers' legislation could include the following:

- a definition of broker to include the 'pure' marketer of gas, and to exclude transmitters and distributors (those owning or operating the physical gas works) which are regulated by the Board, and producers of gas when they sell to transmitters, distributors or brokers;

- a concept of certification in the form of a "certificate of brokerage";

- a prohibition against operating as a broker without a certificate;

- Board powers to:

  - deal with an application for a certificate;

- refuse to issue a certificate;

- issue a certificate, subject to terms and conditions if necessary; such terms and conditions could include: posting of a bond or letter of credit; filing of financial statements; filing of contracts for the purchase and sale of gas and for the transportation of gas; filing of documents verifying the brokers' security of gas supply;

- revoke or suspend a certificate.

o an exemption for a broker with a certificate from the Municipal Franchises Act and Section 19 of the Act.

2.114 The Decision of March 23, 1987, also dealt with the applicability of Section 54, Part IV of the Public Utilities Act to brokers. It was the Board's opinion "that a broker would not necessarily be encompassed by Part IV of the Public Utilities Act ..." (Paragraph 4.45). The Board went on to say in Paragraph 4.109 that Section 54 should be clarified to exclude brokers.

2.115 Section 54 presently reads:

> Where there is a sufficient supply of the public utility, the corporation shall supply all buildings within the municipality situate upon land lying along the line of any supply pipe, wire or rod, upon the request in writing of the owner, occupant or other person in charge of any such building.

2.116 The Board suggests that the section could either be re-enacted to clarify that "the corporation" "owning or operating public utilities" is one which is in the business of owning or operating the physical works required to supply the commodity natural gas, or that brokers could be made exempt from the provisions of the Public Utilities Act (as they would be from the Municipal Franchises Act and Section 19 of the Act as recommended above).

2.117 The Board also dealt in the Decision of March 23, 1987, with diversions by direct purchasers which have an excess supply of gas and wish to sell this gas in Ontario:

> The Board believes that system efficiency could be improved through such diversions and that a direct purchaser should have the opportunity to divert. The Board will recommend changes to the legislation to permit such diversions. (Paragraph 4.49)

2.118 It is the Board's recommendation that the brokers' legislation include a provision to permit, by order of the Board, diversion and

sale of gas by a direct purchaser which is a temporary surplus to the direct purchaser's needs without the requirement for a certificate of brokerage.

2.119 The Board also recommends procedural provisions be included in the legislation to permit the Board to act, in its discretion, with or without a hearing. This would result in more expeditious and efficient resolution of applications for certificates and diversions.

2.120 Finally, in the Decision of March 23, 1987, the Board recommended:

> ... for purposes of clarity and simplicity, all the legislation affecting gas regulation be reviewed and consolidated in one piece of legislation. (Paragraph 4.109)

2.121 Therefore, the Board recommends that the brokers legislation be included as a "Part" in the Act.

Other Terms and Conditions

2.122 The Brokers have taken a position that no other terms or conditions are necessary and that, if the Board's policy is to achieve a competitive market supply of gas for Ontario, it should minimize the amount of regulation, especially where there is no need for it. They submitted

that in Alberta brokers operate "free of any regulation whatsoever", on the assumption that they are regulated by the marketplace.

2.123 Shell submitted that supply contracts for the "core" market should be subjected to a prudence test based on criteria such as an adequate delivery warranty, peak day capabilities, backstop arrangements, and so on.

2.124 Consumers' submitted that Certificates of Public Convenience and Necessity for brokers should be limited to sale of the commodity and resale of services only, and that ownership and operation of pipelines should remain with the LDCs. It said that approval of municipal franchises for brokers should be of short duration, renewable only with specific municipal consent on the basis of quality of service. It also said the LDC must be protected from liability in situations in which it performs a billing and collecting function for brokers. Furthermore, it submitted that co-operatives and other groups should only be entitled to bundled service, presumably since daily metering for individuals and such groups would not be provided and group members would require backstopping among other services. The cost allocation and rate design, in Consumers' submission, should continue to be a primary device for control of equitable and non-

discriminatory use of the system. Consumers' suggested that, in entertaining a broker's submission, the Board should examine: availability of gas, viability of service, availability of T-service, applicability of tolls, taxes and other charges, contract terms, price, and the portfolio of gas supply.

2.125 Union submitted that direct contracting for T-service with brokers would be essentially the same as Unions' standard T-service contract with end-use customers, with the following additions: (1) group billing would be provided on a fee basis for gas moved through each customer meter or, alternatively, end-use customers could be billed individually by Union as a collection agent for the broker; (2) diversion would be permitted both within and external to Union's franchise area, provided that any costs of providing such service are recovered; (3) monthly billing information would be provided, and daily information could be provided by computer for a fee; and (4) storage space would be allocated to the broker for the benefit of the broker's customers. Union submitted that it should be allowed to terminate service to a broker for: failure to deliver; lack of evidence of a signed contract for gas supplies; failure to pay, or bankruptcy; or failure to maintain necessary government approvals.

2.126 Board Staff suggested that Certificates of Public Convenience and Necessity to brokers should be issued as blanket certificates, in order to permit a broker to compete anywhere in Ontario. Also, since the legal and administrative costs of issuing separate certificates on a regional or local basis would be avoided, blanket certificates would facilitate and encourage a competitive environment for gas sales. Staff proposed that the Board adopt an approach to the regulation of brokers which is practical, flexible and simple, and that it recognize the importance of unrestricted entry of brokers if market responsive pricing in a more competitive environment is to be achieved.

The Board's Findings

2.127 The Board recognizes the importance of entry of brokers if market responsive pricing in a more competitive environment is to be achieved. In this spirit, and in order to minimize legal and administrative costs, Certificates of Public Convenience and Necessity issued to Brokers shall be issued on a province-wide basis, for the sale of gas and resale of services only. Given the role of price as an allocator of gas supply which the Board has outlined previously, the Board would be hesitant to adopt a specific prudence test as recommended by Shell. However, the Board would, on complaint with respect to a

broker, explore some of the criteria mentioned by Shell.

2.128 The Board is prepared to review a Certificate of Public Convenience and Necessity, either in response to a complaint or on its own motion. The Board would be prepared to act to suspend or revoke a Certificate.

2.129 If daily metering is not available for individual customers, the Board agrees that it is reasonable to require that "bundled" transportation be purchased for delivery to such individuals. The Board agrees with Consumers' that cost allocation and rate design for the transportation and storage system should continue to be a primary device for control of equitable and non-discriminatory use of the system. In a certificate application the Board would examine all matters which determine the public interest. This would include some evidence of the applicant's intentions when offering brokerage service within the Province, together with evidence in support of its ability to provide service.

2.130 In response to Union's submission, the Board believes that a broker's contract for T-service should entitle it to a monthly bill broken down by delivery point. If Union acts as a billing and collection agent for the broker, it would be entitled to a fee. The Board agrees that

diversions should be permitted, both within and external to the LDCs franchise area, provided that any costs of providing such service are recovered through an appropriate charge. The Board also finds acceptable the concept that, if requested and available, daily information be provided to a broker for a fee, and that storage space, if available, be allocated to the broker for the benefit of a broker's customers. In principle, the Board also agrees that an LDC should be able to terminate service to a broker for causes such as failure to deliver, failure to pay, or failure to maintain necessary government approvals, after due notice to the broker, its customers and this Board, and only after a reasonable period of time allowed for the broker to correct the failure.

3. DISPOSITION OF CERTIFICATE APPLICATIONS

The Certificate Applications

3.1 In light of the Board's findings on the issues as set out in the previous sections of this Decision with Reasons, the Board finds that province-wide Certificates of Public Convenience and Necessity shall be issued to the Applicants, subject to the conditions specified in the following section.

The Board notes that, in accordance with the Municipal Franchises Act, the Applicants will require municipal by-laws, approved by the Board.

Conditions to Apply to Certificates

3.2 The following conditions shall apply to Certificates of Public Convenience and Necessity issued pursuant to these Applications.

1. The Certificate relates only to the sale of gas. The Applicants as brokers may not, directly or indirectly, own or operate the works which transmit or distribute gas.

2. The broker shall provide to an existing or prospective customer on request its most recent audited financial statements and a description of its current natural gas supply (both in the short term and in the long term), or such other information as may be directed by the Board.

3. All prospective customers shall be advised in writing that the Board does not make or imply any guarantee of gas supply. Such customers shall also be advised that there is no guarantee that the LDC will supply gas if the broker's supply fails or when the customer's contract with the broker expires.

4. COSTS

4.1 The Board in E.B.O. 116 set out criteria for determining eligibility for cost awards in certain cases. In that Report, the Board differentiated between a generic hearing and other proceedings.

4.2 With respect to eligibility for cost awards, the Board in its E.B.O. 116 Report set forth the following criteria which it will consider in the exercise of its discretion to award costs. The Board stated that awards may be made to an intervenor which:

- has or represents a substantial interest in the proceeding to the extent that the intervenor or those it represents will be affected beneficially or adversely by the outcome;
- participates responsibly in the proceeding; and

- o contributes to a better understanding of the issues by the Board.

4.3 Northridge stated that costs should be awarded against the utility intervenors on the grounds that the utilities receive particular benefit from the application whether certification is a required procedure or not. If the certification procedure is used for brokers, it will mean that utilities will only have to contract with brokers certified by the Board. If, on the other hand, the Board decides that Certificates of Public Convenience and Necessity should not be required of brokers, the application will have assisted the Board and the utilities in focusing their review of this important issue.

4.4 Northridge added that no intervenors should receive costs against Northridge because none of them actively participated in the hearing.

4.5 With respect to the written submission portion of the proceeding, Northridge stated that the certificate hearing has essentially been a generic hearing and all costs incurred should be made recoverable from the system. It submitted that there would be no justification for burdening the four original Applicants with the costs of the hearing as its real purpose has been to resolve the issue of how brokers in general were to be given access to the market.

4.6 Brenda, ATCOR and Enron took essentially identical positions to Northridge with respect to cost awards.

4.7 The Regional Municipality of Ottawa-Carleton expected to bear its own costs and submitted that all other parties to the hearing do the same.

The Board's Findings

4.8 The Board will issue a cost order in due course as to its costs, and the Applicants shall each pay an equal portion of the Board's costs when assessed. The Board does not consider that any other cost awards are justified.

5. COMPLETION OF PROCEEDINGS

5.1 The Board will issue its cost order with respect to these proceedings in due course, in accordance with paragraph 4.8 hereof.

5.2 Certificates will be issued upon the Applicants meeting the relevant conditions prescribed in Chapter 3.

DATED at Toronto this 9TH day of May, 1988.

R.W. Macaulay, Q.C.
Chairman and Presiding Member

J.C. Butler
Vice-Chairman

D.A. Dean
Member

M. Jackson
Member

C.A. Wolf Jr.
Member